

FILED 10 SEP 14 15:19 USDC-ORE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

STEPHEN B. PUCCETTI and RICHARD  
BOTTINI,

Civil No. 09-6172-AA  
OPINION AND ORDER

Plaintiffs,

vs.

JEFF SPENCER, BRAD DUNCAN, and  
CHRIS HAWKINS,

Defendants.

---

Michelle R. Burrows  
Attorney at Law  
618 NW Glisan Street, Suite 203  
Portland, OR 97209  
Attorney for plaintiffs

John R. Kroger  
Attorney General  
Joseph G. Groshong  
Assistant Attorney General  
Leonard W. Williamson  
Department of Justice  
1162 Court Street NE  
Salem, OR 97301-4096  
Attorneys for defendants

AIKEN, Chief Judge:

Plaintiffs Stephen B. Puccetti ("Puccetti") and Richard Bottini ("Bottini") bring this action for violation of their federal constitutional rights under 28 U.S.C. §§ 1331 and 1343. Defendants Jeff Spencer ("Spencer"), Brad Duncan ("Duncan"), and Chris Hawkins ("Hawkins") bring this motion for summary judgment. For the reasons explained below, defendants' motion is granted and this case is dismissed.

**STATEMENT OF THE FACTS**

On October 26, 2007, plaintiffs went elk hunting with a hunting party (the "Party") in Baker County, Oregon. On the morning of October 27, 2008, Francis DeRoest ("DeRoest") shot an elk ("DeRoest's Elk"). DeRoest radioed the Party, informing them he had an elk down and was out of bullets. Plaintiff Bottini went to find DeRoest.

On his way to DeRoest, Bottini approached defendant Spencer, an off-duty Oregon State Trooper also hunting in the area. Bottini and Spencer spoke for a few minutes until plaintiff Puccetti radioed that he had shot an elk tagged with tracking tag number 89 ("Puccetti's Elk"). Bottini left Spencer to find DeRoest.

Bottini found DeRoest and then left DeRoest to find Puccetti. On his way to Puccetti, Bottini shot an elk ("Bottini's Elk") in the hindquarters. (Pls.' Compl., p. 4).

Bottini radioed Puccetti, informing Puccetti that the wounded elk was heading towards him. Puccetti saw the wounded elk limping badly and shot Bottini's Elk "to put it out of its misery." Id. Bottini's Elk fell down, and Puccetti then shot it through the neck "to terminate it." Id. at 5. Bottini arrived, saw it was the elk he wounded, and tagged Bottini's Elk. Id.

The Party brought Puccetti's Elk to the trailer. DeRoest's Elk was so large it had to be cut in half. As the Party hauled the first half of DeRoest's Elk to the trailer, defendants Hawkins and Duncan, both Oregon State Troopers, approached the Party, demanding to know who shot the elk. Hawkins told the Party that defendant Spencer informed him that DeRoest had shot Puccetti's Elk. DeRoest informed the officers he had not shot Puccetti's Elk. The Party then retrieved the other half of DeRoest's Elk as well as Bottini's Elk. In a reversal of the previous accusation, Hawkins and Duncan then accused Puccetti of shooting both Puccetti's Elk and Bottini's Elk. (Pls.' Am. Compl., p, 5).

Hawkins and Duncan ordered Bottini and Puccetti to provide unexpended shells. Puccetti provided three .7 mm cartridges and Bottini provided one .300 Weatherby cartridge. Plaintiffs then informed Hawkins and Duncan that Puccetti shot Puccetti's Elk and Bottini tagged Bottini's Elk after Puccetti killed Bottini's Elk (after Bottini wounded the elk). Hawkins

and Duncan took the bullets and spoke near their truck. Id. at 5-6.

Shortly after plaintiffs told defendants who shot and tagged Puccetti's Elk and Bottini's Elk, plaintiffs allege that Hawkins and Duncan agreed to plant Puccetti's bullet on Bottini's Elk. Hawkins and Duncan then agreed to use the "planted" bullet as evidence to charge plaintiffs with crimes. The officers seized Bottini's Elk and Puccetti's rifle. Hawkins issued Puccetti a citation for Unlawful Taking of Wildlife. (Pls.' Compl., p. 6). Hawkins issued Bottini a citation for Lending a Big Game Tag. Id. Although the Party requested Hawkins check the hindquarters of Bottini's Elk to see the right leg and hip damage (necessitating the "kill shots" by Puccetti), the officers refused to examine Bottini's Elk.

The officers then concluded DeRoest's Elk and Puccetti's Elk were legally taken. Puccetti again requested Hawkins examine Bottini's Elk. Hawkins responded that only two shots were fired and admonished Puccetti for refusing to allow a thorough and fair investigation.

In the following weeks, counsel for plaintiffs contacted the Baker County District Attorney (the "DA"), informing the DA that plaintiffs wanted to examine the evidence relating to the charges. This evidence included Bottini's Elk, bullets, pictures, and notes from the investigation. Instead of

preserving Bottini's Elk, plaintiffs allege that Hawkins delivered the elk to a butcher, and requested the elk be processed into steaks in order to destroy evidence as the case against plaintiffs "may be a lost case." (Pls.' Am. Compl., p. 8). The butcher later provided the DA with evidence supporting plaintiffs' version of events and proving defendants planted Puccetti's bullet on Bottini's Elk. Id.

On November 16, 2007, Hawkins took Bottini's Elk from the butcher's shop. Id. at 9. Hawkins also filed an official report which contained numerous false and contrived items in support of his illegal actions. Id. Hawkins destroyed the elk and destroyed photographs which would have supported plaintiffs' version of events. Plaintiffs allege that defendants' actions resulted in plaintiffs' prosecution by the DA. The DA asserts that regardless of his belief of defendants' version of the facts, plaintiffs' admissions alone formed a basis for their prosecution for violations of Oregon law. (Fisher's Aff., 2). Plaintiffs' prosecutions were ultimately dismissed by the court due to defendants' failure to comply with the constitutional requirements to preserve and protect exculpatory evidence.

#### **STANDARD OF REVIEW**

Summary Judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and

that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Substantive law on an issue determines the materiality of a fact. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). Whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party determines the authenticity of a dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. Id. at 324.

Special rules of construction apply when evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. T.W. Elec., 809 F.2d at 630.

#### **DISCUSSION**

The court previously granted defendants' motion to dismiss plaintiffs' claims of unreasonable arrest and Brady violations. Because plaintiffs' claims were unclear, plaintiffs were granted leave to amend the complaint to "state separately

the state and federal claims as well as the various federal claims under § 1983." (Op. and Order for Defs.' Mot. to Dismiss, p. 12). See Awabdy v. City of Adelanto, 368 F.3d 1062, 1072 (9<sup>th</sup> Cir. 2004). Plaintiffs' amended complaint, however, realleged Brady violations, in addition to articulating § 1983 claims of malicious prosecution and due process violations under Devereaux, and a state law tort of malicious prosecution. (Pls.' Am. Compl. p. 11-14).

#### A. Brady Violations

Plaintiffs, again, argue due process violations as a result of withheld and/or destroyed evidence material to plaintiffs' innocence. Plaintiff states these claims are based on the due process protections outlined in Brady v. Maryland, 373 U.S. 83 (1963). (Pls.' Resp. to Mot. to Dismiss, p. 6). As noted in the prior opinion, Brady violations require three elements: 1) the suppressed evidence must be favorable to the accused; 2) the state must have suppressed the evidence; and 3) the suppressed evidence must be material to the guilt or innocence of the accused. United States v. Jernigan, 492 F.3d 1050, 1053 (9th Cir. 2007) (en banc). To be "material," the suppressed evidence must have had a "reasonable probability" of producing a different result had the evidence been admitted at trial. Id. at 1053-54. As stated in the Order for Motion to Dismiss, plaintiffs were never convicted at trial as the charges

were ultimately dismissed. (Pls.' Compl., p. 13).

As a result, this court previously held that plaintiffs "may not now bring claims based on Brady violations as plaintiffs cannot show that any suppressed evidence could have produced a different result at trial." (Order and Op. for Defs.' Mot. to Dismiss, p. 13).

It appears that plaintiffs further allege that defendants' order to destroy the elk carcass also supports their due process violation under Devereaux (discussed below). This, however, is improper. Due process violations as a result of failure to preserve potentially exculpatory evidence are analyzed under Arizona v. Youngblood, 488 U.S. 51 (1998). "A due process violation based on the failure to preserve *potentially* exculpatory evidence requires a showing of bad faith on the part of the official. Atkins v. County of Riverside, 151 Fed.Appx. 501, 507 (9<sup>th</sup> Cir. 2005) (citing Youngblood, 488 U.S. at 57). Youngblood distinguished *potentially* exculpatory evidence, from that which is known to be exculpatory, as in Brady. Id. See also California v. Trombetta, 467 U.S. 479 (1984) (discussing potentially exculpatory evidence and holding the exculpatory value of the evidence must be apparent "before the evidence was destroyed").

Here, despite the fact that the carcass of Bottini's Elk may have been destroyed in bad faith, there was no

exculpatory value to the carcass. As discussed below, although the carcass *may* have provided evidence which supported plaintiffs' claims of a crippling shot to the hindquarters, such evidence would not exculpate plaintiffs from the claims with which they were charged.

Therefore, no genuine issue of material fact remains to this claim. Because this court already dismissed all claims based on Brady violations, and because the elk carcass could not have potentially provided any exculpatory value, defendants' motion for summary judgment on plaintiffs' claims of due process violations under Brady or Youngblood is granted.

#### B. Malicious Prosecution

Courts look to state law when analyzing claims of malicious prosecution under 42 U.S.C. § 1983. See Usher v. City of Los Angeles, 828 F.2d 556, 562 (9th Cir. 1987) (relying on California's elements of malicious prosecution); see also Awabdy, 368 F.3d at 1067. Under Oregon law, malicious prosecution requires: 1) the initiation or continuation of criminal proceedings; 2) by or at the insistence of the defendant; 3) terminating in plaintiff's favor; 4) instituted with malice; 5) a lack of probable cause for the proceedings; and 6) damages. Blandino v. Fischel, 179 Or. App. 185, 190-91, 39 P.3d 258, 261 (2002). The existence of probable cause is a complete defense to malicious prosecution. Gustafson v. Payless Drug Stores

Northwest, Inc., 269 Or. 354, 356, 525 P.2d 118, 119-20 (1974).

A defendant has probable cause to initiate criminal proceedings if he reasonably believes plaintiff acted in a particular manner and such action indeed constitutes the offense charged. Id. at 356-57. However, a plaintiff may rebut a prima facie presumption of probable cause to initiate criminal proceedings "by showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." Awabdy, 368 F.3d at 1067; Hryciuk v. Robinson, 213 Or. 542, 558-59, 326 P.2d 424, 431-32 (1958).

It is undisputed that plaintiffs Bottini and Puccetti admitted to defendants that they had wounded and "terminated" Bottini's Elk, respectively. Therefore, defendants had probable cause to issue citations to both plaintiffs. (Order and Op. for Defs.' Mot. to Dismiss, p. 8). The question for this court is whether a genuine issue of material fact exists regarding defendants' conduct after the arrest, that is, did defendants "induc[e] [the initiation of criminal proceedings] by . . . fabricat[ing] evidence, or other wrongful conduct undertaken in bad faith." Awabdy, 368 F.3d 1067; see also Blankenhorn v. City of Orange, 485 F.3d 463, 482-83 (9<sup>th</sup> Cir. 2007) (discussing how information is "legally relevant" to such determination if it is required to form a basis for a claim, or is the sole information

relied on by the prosecutor in making the decision to charge).

(I) Plaintiff Bottini's citation for Lending a Big Game Tag

Defendants cited Bottini under O.R.S. § 498.002 for assisting Puccetti with the "Unlawful Taking of Wildlife" by "Lending a Big Game Tag" based on Bottini and Puccetti's admissions that Bottini put his "tag" on the "Bottini elk," which Puccetti killed. (Pls.' Am. Compl., p. 6). The Oregon Big Game Regulations (the "Regulations") require that hunters obtain a valid "tag" prior to hunting. O.R.S. § 497.075(1); Oregon Big Game Regulations, 64 (2007). A "'tag' is a document authorizing the taking of a designated kind of mammal at a specified time and place." O.A.R. 635-045-002(75) (2007). Each elk "tag" allows the recipient to "take" one elk for the hunt specified. Id. at 64-70. To "take" an animal is to "kill or obtain possession or control" of the animal. Id. at (76). It is unlawful "[t]o sell, lend, or borrow any big game tag." O.A.R. 635-065-0760(8) (2007). O.R.S. § 498.002 prohibits any person from taking or possessing, or assisting another to take or possess "any wildlife in violation of the wildlife laws or of any rule promulgated pursuant thereto." O.R.S. § 498.002. There is a "mercy killing" statute that provides an exception to the Regulations. O.R.S. § 498.016. This statute provides:

[n]othing in the wildlife laws is intended to prohibit any person from killing any crippled

or helpless wildlife when the killing is done for a humane purpose. Any person so killing any wildlife shall immediately report such killing to a person authorized to enforce the wildlife laws, and shall dispose of the wildlife in such manner as the State Fish and Wildlife Commission directs.

ORS 498.0016 (emphasis added).

Plaintiffs allege defendants provided the DA with falsified evidence, and that the false evidence "induced" the decision to prosecute because had the DA received a truthful report, he would have applied the "mercy killing" law and not filed charges. See Awabdy, 368 F.3d at 1067 (citing Galbraith v. County of Santa Clara, 307 F.3d 1119, 1126-27 (9<sup>th</sup> Cir. 2002) (plaintiff's allegations that coroner's knowingly or recklessly false statements led to his arrest and prosecution were sufficient to state a § 1983 claim)).

The facts as to Bottini are undisputed. Bottini tagged an elk he did not kill, which violates Oregon law. Because he did not kill the elk, O.R.S. § 498.016 does not apply. Thus, any alleged falsified evidence provided by the defendants would have been irrelevant to the DA's determination to initiate proceedings against Bottini. Further, unlike the prosecutor in Blankenhorn, the DA here based his decision to prosecute Bottini on more than defendants' reports. He also relied on Bottini's own admissions and on witness interviews. (Fisher Aff., p. 2). It is significant that plaintiffs' admissions themselves establish the

violation of O.R.S. § 498.002. Id. Therefore, no reasonable juror could conclude that defendants' alleged actions or falsified evidence induced Bottini's prosecution under O.R.S. § 498.002. Thus, defendants' motion for summary judgment as to the malicious prosecution of plaintiff Bottini is granted.

(ii) Plaintiff Puccetti's citation for Unlawful Taking of Wildlife

Defendants cited Puccetti under O.R.S. § 498.002 for the Unlawful Taking of Wildlife for killing an elk for which he did not have a tag. (Pls.' Am. Compl., p. 6). It is undisputed Puccetti admitted he killed Bottini's Elk to "put it out of its misery," and Bottini tagged it. (Pls.' Am. Compl., p. 4-5). It was Puccetti's second kill. Id. The Regulations permit only one elk tag per person. O.A.R. 635-045-002 (64-70) (2007). Because Puccetti was the hunter who actually killed Bottini's elk, O.R.S. § 498.016 may be applicable if the kill was for humane purposes and it was properly reported.

Plaintiffs' allege that defendants planted bullets on the elk, negating the claim that Puccetti was the mercy kill shot, subsequent to Bottini's wounding/crippling shot. Plaintiffs further allege defendants provided the DA with this falsified evidence, and that false evidence "induced" the DA to file criminal charges. Plaintiffs assert that had the DA received a truthful report, he would have applied the "mercy

killing" statute and not filed charges. See Blankenhorn, 485 F.3d at 482-83 (discussing prosecutor reliance on legally relevant information to make charging determinations).

Again, unlike the prosecutor in Blankenhorn, the DA here relied on more than just defendants' reports, and testifies that regardless of whether he believed defendants' version of the events after conducting his own investigation, he still would have prosecuted plaintiffs based on their own admissions. (Fisher Aff., p. 2).

Therefore, a reasonable juror could conclude Bottini's Elk was terminated by Puccetti for humane purposes, and that a truthful report from defendants would have caused the DA to consider this a mercy kill under O.R.S. § 498.016. However, the second prong of ORS 498.016 is fatal to plaintiffs' claims.

That prong provides "[a]ny person [killing wildlife for humane purposes] shall immediately report such killing to a person authorized to enforce the wildlife laws, and shall dispose of the wildlife in such manner as the [authorities] directs. ORS 498.016 (emphasis added). There is no evidence in the record which could cause a reasonable juror to conclude plaintiffs had any intention, or undertook any action, to immediately report the "mercy" killing of Bottini's elk. Nor is there evidence plaintiffs had any intention of disposing the animal according to the direction of the Fish and Wildlife services. After Bottini

tagged the elk plaintiffs began carrying their kills back to the truck. (Pls.' Am. Compl., p. 5). The "report" by plaintiffs was undertaken only after defendants approached plaintiffs and accused them of violating the law. *Id.* Had the plaintiffs intended to execute a "mercy kill" as allowed by Oregon law, there would have been no reason to tag the animal. Further, a reasonable juror would conclude that when recounting the events to defendants, plaintiffs would have been as vigilant about asserting their intention to report the "mercy kill" as they were about the fact the animal was first wounded and the kill was done out of mercy.

A reasonable juror could not conclude that Puccetti was in compliance with the second portion of ORS 498.016. Therefore, none of defendants' actions subsequent to plaintiffs' admissions could reasonably be considered relevant to the DA in his determination to initiate legal proceedings. Defendants' motion for summary judgment for malicious prosecution of plaintiff Puccetti is granted.

(iii) State tort law Malicious Prosecution claim

Courts look to state law when analyzing claims of malicious prosecution under 42 U.S.C. § 1983. See Usher, 828 F.2d at 562 (using California's elements of malicious prosecution); see also Awabdy, 368 F.3d at 1067. Therefore, because Oregon law was applied to the above determinations on

plaintiff's § 1983 malicious prosecution claim, the same holding will apply to the claim arising under state law. As such, defendants' motion for summary judgment on plaintiffs' state law claim for malicious prosecution is granted.

C. Fabrication of Evidence

Plaintiffs' claim that defendants deliberately fabricated evidence is dismissed as moot. Therefore, it is irrelevant whether a material issue of fact exists. As stated by the Ninth Circuit, "there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." Devereaux v. Abbey, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc). However, for jurisdictional purposes, plaintiffs must "satisfy the requirement imposed by Article III of the Constitution by alleging an actual case or controversy." City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1982) (citing Flast v. Cohen, 392 U.S. 83, 94-101 (1968)). Plaintiffs must also demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions." Lyons, 461 U.S. at 101 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)). "Abstract injury is not enough." Id. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct

"injury" as a result of the challenged conduct and the injury [or threat thereof] must be both "real and immediate," not "conjectural" or "hypothetical." Lyons, 461 U.S. at 101 (citing Golden v. Zwickler, 394 U.S. 103, 109-110 (1969), United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947), Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)).

In O'Shea v. Littleton, 414 U.S. 488 (1974), the Court held that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects." Id., at 495-96. In O'Shea, the Court found that the mere possibility of a threat that plaintiffs could again be subjected to discriminatory bond hearings was not "sufficiently real and immediate to show an existing controversy." Id. at 496. The Court stated it assumed plaintiffs will "conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners." Id. at 497. See also Rizzo v. Goode, 423 U.S. 362 (1976) (reiterating its holding from O'Shea providing that "past wrongs do not in themselves amount to that real and immediate threat" required for a controversy)).

In Lyons, the plaintiff alleged he was illegally choked by police subsequent to being stopped for a traffic violation by police officers. Lyons, 461 U.S. at 95. The Court held that

to establish an actual controversy in this case, [plaintiff] would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in [the city] *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner.

Id. at 105-06.

Similar to O'Shea and Lyons plaintiffs here allege constitutional violations based on one alleged isolated incident with defendants. The alleged conduct is not ongoing, nor is there a threat of it continuing or repeating. Further, even assuming plaintiffs' allegations were true, the fabricated evidence played no role in proving, or mitigating plaintiffs' actions in violation of O.R.S. § 498.002; thus there was never an injury as a result of defendants' alleged conduct.

Here, like Lyons, to establish an actual controversy plaintiffs would have to allege they would have another similar encounter with police as a result of their hunting conduct, and "make the incredible assertion either, (1) that *all* [Oregon State] police officers *always* [fabricate evidence] or, (2) that the [State] ordered or authorized [defendants' conduct.]" Lyons, 461 U.S. at 105-06. Plaintiffs have not made such an assertion, nor would such assertion be plausible or realistic.

Assuming *arguendo*, plaintiffs' allegations are true,

defendants' conduct is not only unethical, but also a clear violation of due process. Due process violations aside, defendants' alleged conduct is unacceptable, and certainly not condoned by this court. Police officers have a duty to maintain evidence and the integrity of an investigation, regardless of their personal beliefs. Moreover, it goes without saying that police officers should not compromise an investigation by "planting" or destroying evidence. Such behavior is contrary to the very foundation of their duty as sworn officers of the justice system. As such, defendants' alleged conduct, although irrelevant in determining the pending motion, is deplorable. However, because plaintiffs have not sustained, nor are they in immediate danger of sustaining, an injury that is more than abstract and hypothetical, an actual case or controversy does not exist. Therefore, plaintiffs fail to satisfy "the threshold requirements imposed by Article III of the Constitution" to invoke federal court jurisdiction. Id. at 102. As such, despite the disappointing conduct of defendants, this issue is dismissed as moot, and defendants' motion for summary judgment is granted.

#### **CONCLUSION**

Defendants' motion for summary judgment (doc. 33) is granted and this case is dismissed. All pending motions are denied as moot.

IT IS SO ORDERED.

Dated this 10 day of September 2010.

  
\_\_\_\_\_  
Ann Aiken  
United States District Judge